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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE GUEVARA SR.,)	NO. CV 10-4134-ABC (MAN)
)	
Petitioner,)	
)	
v.)	ORDER DISMISSING PETITION
)	AS SECOND OR SUCCESSIVE;
LARRY SMALLS,)	AND DENYING CERTIFICATE OF
)	APPEALABILITY
Respondent.)	
_____)	

On May 26, 2010, Petitioner filed a habeas petition, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Southern District of California ("Petition"). The Petition thereafter was transferred to this District and filed on June 3, 2010. The Petition is the second Section 2254 habeas petition Petitioner has filed stemming from his 1998 state conviction, based on a violation of California Penal Code § 459, and his related Three Strikes sentence.

Under the Rules Governing Section 2254 Cases in the United States District Courts, a habeas petition filed by a prisoner in state custody "must" be summarily dismissed "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief

1 in the district court." Rule 4, 28 U.S.C. foll. § 2254. For the
2 reasons set forth below, the Petition must be, and is, DISMISSED as
3 second or successive, pursuant to 28 U.S.C. § 2244(b) and Rule 4.

4
5 **BACKGROUND**
6

7 On July 15, 2002, Petitioner filed a Section 2254 habeas petition
8 in this Court in Case No. CV 02-5561-ABC (MAN) (the "First Action").
9 The First Action challenged Petitioner's 1998 conviction and sentence
10 imposed in the Los Angeles Superior Court and raised four habeas claims,
11 to wit: (1) the prosecutor committed misconduct during closing argument
12 by expressing her personal belief in Petitioner's guilt; (2) defense
13 counsel provided ineffective assistance, because she failed to request
14 a curative instruction regarding the prosecutor's comment; (3) the trial
15 court abused its discretion by failing to strike Petitioner's prior
16 convictions; and (4) there was insufficient evidence that Petitioner's
17 prior convictions constituted "strikes" and "serious felonies" under the
18 Three Strikes law and the enhancement statutes. (First Action petition
19 at 5-6.)¹
20

21 On May 17, 2004, Judgment was entered denying the First Action
22 petition on its merits and dismissing the First Action with prejudice.
23 Petitioner did not appeal.
24

25 In this action, Petitioner again seeks Section 2254 habeas relief
26

27 ¹ Pursuant to Rule 201 of the Federal Rules of Evidence, the
28 Court takes judicial notice of its records and files in the First
Action.

1 based on this same 1998 state conviction and sentence. The instant
2 Petition alleges a single habeas claim, in which Petitioner again argues
3 that the trial court committed sentencing error in connection with its
4 findings regarding Petitioner's prior "strike" convictions and the
5 related sentence imposed.

6 7 DISCUSSION

8
9 State habeas petitioners generally may file only one federal habeas
10 petition challenging a particular state conviction and/or sentence.
11 See, e.g., 28 U.S.C. § 2244(b)(1) (courts must dismiss claim presented
12 in second or successive petition when that claim was presented in a
13 prior petition) and § 2244(b)(2) (with several exceptions discussed
14 *infra*, courts must dismiss a claim presented in a second or successive
15 petition when that claim was not presented in a prior petition). "A
16 habeas petition is second or successive . . . if it raises claims that
17 were or could have been adjudicated on the merits" in an earlier Section
18 2254 petition. McNabb v. Yates, 576 F.3d 1028, 1029 (9th Cir. 2009).

19
20 In those instances when Section 2244(b) provides a basis for
21 pursuing a second or successive Section 2254 habeas petition (described
22 below), state habeas petitioners seeking relief in this district must
23 first obtain authorization from the Ninth Circuit before filing any such
24 second or successive petition. 28 U.S.C. § 2244(b)(3). The Ninth
25 Circuit "may authorize the filing of a second or successive [petition]
26 only if it presents a claim not previously raised that satisfies one of
27 the grounds articulated in § 2242(b)(2)." Burton v. Stewart, 549 U.S.
28 147, 153, 127 S. Ct. 793, 796 (2007).

1 In the First Action, Petitioner sought Section 2254 relief based on
2 the same 1998 state court conviction and sentence challenged in this
3 action, and he raised four claims that were resolved adversely to him on
4 their respective merits. Accordingly, the instant Petition, which
5 challenges the same 1998 conviction and sentence, is second or
6 successive within the meaning of Section 2244(b).

7
8 Critically, Petitioner has not obtained permission from the Ninth
9 Circuit to bring this second or successive Petition, as required by
10 Section 2244(b)(3).² Permission to file a second or successive petition
11 may be granted only if Petitioner makes a *prima facie* showing that: (1)
12 the claim relies on a new, and previously unavailable, rule of
13 constitutional law, which the Supreme Court has ordered be made
14 retroactive to collateral proceedings; or (2) the factual predicate of
15 the claim could not have been discovered earlier through the exercise of
16 due diligence, and the facts alleged, if proven, would be sufficient to
17 establish by clear and convincing evidence that, but for the
18 constitutional error claimed, no reasonable fact-finder would have found
19 Petitioner guilty. See 28 U.S.C. § 2244(b)(2)(A)(B) and (3)(C); McNabb,
20 576 F.3d at 1030. To pursue a Section 2254 habeas action attacking his
21 1999 conviction and/or sentence, Petitioner must persuade the Ninth
22 Circuit that one or both of these predicates exists for any claim he now
23 wishes to raise. Based on the nature of the claim alleged in the
24 Petition -- which appears to be repetitive, to some extent, of two of
25 the claims alleged in the First Action and resolved adversely to him and

26
27 ² Pursuant to Rule 201, the Court also takes judicial notice of
28 the electronic dockets for the Ninth Circuit available through the PACER
system. Those electronic dockets show that Petitioner has **not** filed any
Section 2244(b) application in the Ninth Circuit.

1 to be based on facts that would have been known to Petitioner as of the
2 time of sentencing -- it is difficult to see how Petitioner will be able
3 to satisfy Section 2244(b)'s requirements.³

4
5 As Petitioner has not obtained permission from the Ninth Circuit to
6 bring a second or successive petition, the instant Petition must be
7 dismissed, because this Court lacks jurisdiction to consider it. 28
8 U.S.C. § 2244(b); see also Burton, 549 U.S. at 157, 127 S. Ct. at 799
9 (district court lacks jurisdiction to consider the merits of a second or
10 successive petition absent prior authorization from the circuit court).
11 Accordingly, IT IS ORDERED that Judgment be entered dismissing this
12 action without prejudice.

13
14 In addition, pursuant to Rule 11(a) of the Rules Governing Section
15 2254 Cases in the United States District Courts, the Court has
16 considered whether a certificate of appealability is warranted in this
17 case. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484-
18 85, 120 S. Ct. 1595, 1604 (2000). The Court concludes that a
19 certificate of appealability is unwarranted, and thus, a certificate of
20 appealability is DENIED.

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25 ³ The Court notes that Petitioner's conviction became final in
26 mid-2000. Assuming, *arguendo*, that Petitioner would receive statutory
27 tolling for the state habeas petitions he filed that were pending in
28 2001-02, before he filed the First Action, Petitioner's limitations
period expired at the latest sometime in 2002. Thus, the instant
Petition appears to be substantially untimely under 28 U.S.C. §
2244(d)(1), in addition to being second or successive.

1 IT IS FURTHER ORDERED that the Clerk serve copies of this Order and
2 the Judgment herein on Petitioner.

3
4 DATED: June 8, 2010

Audrey B. Collins

5
6 AUDREY B. COLLINS
CHIEF UNITED STATES DISTRICT JUDGE

7
8 PRESENTED BY:

9 *Margaret A. Nagle*

10 MARGARET A. NAGLE
11 UNITED STATES MAGISTRATE JUDGE